

A KCSB Konsortium Sdn Bhd v Tenaga Nasional Bhd & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 21NCVC-13-11
OF 2013

B TEO SAY ENG J
21 OCTOBER 2014

C *Tort — Trespass — Trespass to land — Allegation that main electricity supplier unlawfully maintained substation and overhead transmission lines along plots of land — Allegation of unlawful entering and continuing trespass — Whether there was consent of State/Federal authorities in accordance with provisions of Electricity Act 1949 and Electricity Supply Act 1990 — Whether area taken by transmission lines exceeded consent given by State/Federal authorities — Whether trespass was continuous*

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E The plaintiff was the registered owner of two plots of land, namely Lot 139 and Lot 1876 in Johor Bahru while the first defendant was the main electricity supplier for the country. The second defendant was the local authority responsible for the plaintiff's lands in the Johor Bahru. The plaintiff alleged that the first defendant had committed an act of trespass on the two plots of land. For Lot 139, the plaintiff claimed that the first defendant had unlawfully maintained the substation and the overhead transmission lines running across

F Lot 139 which was constructed pursuant to the lease agreement. For Lot 1876, the plaintiff claimed that the first defendant had unlawfully entered into Lot 1876 between the years 1974 and 1975 and now it claimed damages for continuing trespass on account of the first defendant's overhead transmission lines running across Lot 1876. The first defendant denies the plaintiff's claim.

G The issues to be tried were when the first defendant entered Lot 1876 to erect the transmission lines, was it with the consent of the State/Federal authorities in accordance with the provisions of the Electricity Act 1949 and its successor Electricity Supply Act 1990; whether such consent was given by the State/Federal authorities required to be endorsed on the title for Lot 1876

H under the National Land Code 1965 ('the NLC'); whether such consent given by the State/Federal authorities valid and limited for a maximum period of 30 years only under the NLC; whether the area taken by the transmission lines exceeded the consent given by the State/Federal authorities; what was the total area taken by the transmission lines; whether it amounted to trespass and if so,

I whether that trespass was continuing.

Held, dismissing the claim with costs of RM25,000:

- (1) The first defendant had no duty to remove the substation building after the expiry of the lease and was not a trespasser by the presence of the

substation building even with TNB Logo on its external wall after the expiry of the 30 year lease agreement. Since the plaintiff had obtained the ownership over Lot 139 during the tenure of the TNB's 30 year lease which was registered on the title of Lot 139, the plaintiff was deemed to have knowledge of the existence of the substation building (see paras 13–14).

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- (2) LLN had sought the consent of MINDEF which was the lawful occupier by the license of the Federal Land Commissioner which was a Federal Government entity in order that they may be allowed to enter upon Lot 139 to carry out the necessary works for the purposes of electricity supply which would include a substation as well as the transmission line. It did not make sense for the plaintiff to say that the approval for TNB to enter Lot 139 was to build the substation only as the supply of electricity could not be supplied via the substation without the transmission lines. There was sufficient evidence to show that consent had been given to the first defendant to enter Lot 1876 to erect transmission lines there. The consent was given to the first defendant under s 53 of the 1949 Act to build transmission lines to provide electricity supply over Lot 139 and Lot 1876 irrespective of the 30 year lease agreement (see paras 23–24).

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- (3) The right to enter and to erect upon such land, such post and apparatus as might be necessary for the purposes of installation of any system of distribution of energy is governed by the Electricity Act. As to whether the notice of such right of entry needed to be endorsed on the title to the subject land would depend on the provisions of the Act. There were two positions governing the endorsement of notice of such entry under the Act namely; the 1949 Act and the 1949 Act. Since s 53(9A) of the Electricity Act 1990 which was added to s 53 by the Electricity (Amendment) Act 1984 affects the right of a party, it shall not have any retrospective effect on s 53 of the Electricity Act 1949 (see paras 44–45).

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- (4) Since it had been established that consents were applied for the erection of the transmission lines over Lot 139 and Lot 1876 and were granted under s 53 of the Electricity Act 1949, the actual land area consented for the erection of the transmission lines need not be determined at that stage but will be considered during the enquiry proceeding conducted by the Land Administrator. Whether the transmission lines have exceeded the area consented should be determined by the Land Administrator during the enquiry. The plaintiff could not claim damages for trespass arising from the exercise of the statutory right of entry to construct the transmission lines under s 53 of the Electricity Act (see paras 65–67).

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[Bahasa Malaysia summary]

Plaintif merupakan pemilik berdaftar dua bidang tanah, iaitu Lot 139 dan Lot 1876 di Johor Bahru manakala defendan pertama merupakan pembekal utama

- A elektrik Negara. Defendan kedua adalah pihak berkuasa negeri yang bertanggungjawab bagi tanah plaintif di Johor Bahru. Plaintif mendakwa bahawa defendan pertama telah melakukan kesalahan mencerooboh dua bidang tanah tersebut. Bagi Lot 139, plaintif mendakwa bahawa defendan pertama telah secara tidak sah mengekalkan pencawang dan talian transmisi overhead
- B dari Lot 139 yang dibina berikutan perjanjian pajakan. Bagi Lot 1876, plaintif mendakwa bahawa defendan pertama telah secara tidak sah memasuki Lot 1876 antara tahun 1974 dan 1975 dan ia kini menuntut ganti rugi bagi pencerobohan berterusan atas sebab talian transmisi overhead sepanjang Lot 1876. Defendan pertama menafikan tuntutan-tuntutan plaintif. Isu-isu yang
- C harus dibicarakan adalah sama ada semasa defendan pertama memasuki Lot 1876 untuk mendirikan talian transmisi, adakah ia dengan kebenaran Pihak Berkuasa Negeri/Persekutuan selaras dengan peruntukan-peruntukan Akta Elektrik 1949 dan akta terkemudian iaitu Akta Bekalan Elektrik 1990; sama ada persetujuan yang diberikan oleh pihak berkuasa negeri memerlukan
- D pengendorsan hak milik bagi Lot 1876 di bawah Kanun Tanah Negara ('KTN'); sama ada persetujuan sedemikian yang diberikan oleh pihak berkuasa Negeri/Persekutuan sah dan terhad kepada tempoh 30 tahun di bawah KTN; sama ada kawasan yang diambil oleh talian transmisi melebihi persetujuan yang diberikan oleh Pihak Berkuasa Negeri/Persekutuan; apakah jumlah total
- E yang diambil oleh talian transmisi; sama ada ia terjumlah kepada pencerobohan dan jika ya, sama ada pencerobohan tersebut adalah berterusan.

Diputuskan, menolak tuntutan dengan kos sebanyak RM25,000:

- F (1) Defendan pertama tidak mempunyai tanggungjawab untuk meruntuhkan bangunan pencawang tersebut selepas tamat tempoh pajakan dan bukanlah penceroboh dengan adanya bangunan pencawang walaupun terdapat logo TNB pada dinding luar selepas tamat tempoh perjanjian pajakan selama 30 tahun. Oleh kerana plaintiff sudah
- G mendapat hak milik ke atas Lot 139 sepanjang tempoh pajakan 30 tahun TNB yang telah didaftarkan pada tajuk Lot 139, plaintif dikatakan mempunyai pengetahuan mengenai kewujudan bangunan pencawang (lihat perenggan 13–14).
- H (2) LLN telah mendapatkan persetujuan MINDEF yang merupakan penghuni yang sah melalui lesen Pesuruhjaya Tanah Persekutuan yang merupakan entiti Kerajaan Persekutuan agar mereka dibenarkan untuk memasuki Lot 139 untuk menjalankan kerja-kerja yang perlu bagi tujuan bekalan elektrik yang mana termasuk pencawang dan talian transmisi. Ia tidak masuk akal sekiranya plaintif mengatakan bahawa kelulusan bagi TNB untuk memasuki Lot 139 adalah untuk membina
- I pencawang sahaja kerana elektrik tidak boleh dibekalkan melalui pencawang tanpa talian transmisi. Terdapat bukti yang mencukupi untuk menunjukkan kebenaran telah diberikan kepada defendan pertama untuk memasuki Lot 1876 bagi mendirikan talian transmisi di

sana. Kebenaran telah diberikan kepada defendan pertama di bawah s 53 Akta 1949 untuk membina talian transmisi untuk menyediakan bekalan elektrik ke atas Lot 139 dan Lot 1876 tanpa mengira perjanjian pajakan 30 tahun (lihat perenggan 23–24).

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- (3) Hak untuk memasuki dan untuk mendirikan tiang dan peralatan atas tanah tersebut yang mungkin diperlukan bagi maksud pemasangan apa-apa sistem pengagihan tenaga ditadbir oleh Akta Elektrik. Mengenai sama ada notis hak kemasukan sedemikian yang diperlukan untuk diendorkan pada hakmilik tanah yang dipertikaikan adalah bergantung kepada peruntukan-peruntukan Akta tersebut. Terdapat dua kedudukan yang mengawal pengesahan notis kemasukan di bawah Akta iaitu; Akta 1949 dan 1949. Memandangkan s 53(9A) Akta Elektrik 1990 yang telah diserap ke dalam s 53 oleh Akta Elektrik (Pindaan) 1984 menyentuh hak satu-satu pihak, ia tidak mempunyai apa-apa kesan retrospektif pada s 53 Akta Elektrik 1949 (lihat perenggan 44–45).

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- (4) Oleh kerana telah terbukti bahawa persetujuan telah digunakan untuk mendirikan talian transmisi di atas Lot 139 dan Lot 1876 dan telah diberikan di bawah s 53 Akta Elektrik 1949, kawasan tanah sebenar yang dipersetujui untuk didirikan talian transmisi tidak perlu diputuskan pada peringkat itu tetapi akan dipertimbangkan semasa prosiding siasatan yang dijalankan oleh Pentadbir Tanah. Sama ada talian transmisi melebihi kawasan berkenan hendaklah ditentukan oleh Pentadbir Tanah semasa siasatan. Plaintiff tidak boleh menuntut ganti rugi kerana pencerobohan yang timbul daripada pelaksanaan hak berkanun kemasukan untuk membina talian penghantaran di bawah s 53 Akta Elektrik (lihat perenggan 65–67).]

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Notes

For cases on trespass to land in general, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2099–2157.

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Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784, CA (refd)
Arumugam a/l Letchumanan v Tenaga Nasional Bhd [2011] 5 MLJ 279, HC (refd)

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Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584, FC (refd)

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Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404, SC (refd)

MTB Rubber Sdn Bhd v Wangi KMB Bhd [2007] 8 MLJ 241, HC (refd)

- A** *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603, HC (refd)
Oakfield Enterprise Sdn Bhd v Tenaga Nasional Bhd [1998] MLJU 70, HC (refd)
Syarikat Pengangkutan Kesejahteraan Sdn Bhd & Anor v Tenaga Nasional Bhd; Ng Ah Boon (Third Party) [2010] 1 CLJ 625, HC (refd)
B *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, CA (refd)
Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd [2006] 6 MLJ 24, HC (refd)
Tio Chee Hing & Ors v Government of Sabah [1981] 1 MLJ 207, FC (refd)
C *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd* [1986] 1 MLJ 412 (refd)

Legislation referred to

- D** Electricity Act 1949 ss 52, 53, (1), (4), (5), (9A), 55(1), 58, 59
 Electricity Act 1990 ss 11, (1), (2), (6), 16, 53(9A)
 Electricity (Amendment) Act 1984
 Federal Constitution art 13(1)
 Limitation Act 1953 s 6(1)(a)
 National Land Code
E *Krishna all V Dallumah (Indran all V Kumaraguru with him) (Krishna Dallumah, Manian & Indran) for the plaintiff.*
V Vishnukumar (Thinagaran all Batumalai with him) (Alvin John & Partners) for the defendant.

F **Teo Say Eng J:**

BRIEF FACTS OF THE CASE

- G** [1] It is not disputed that the plaintiff is the registered owner of two plots of land held under PN 10081 Lot 139 Mukim Tebrau (formerly known as Pajakan No 548 Lot 139 Mukim Tebrau) measuring 71 acres or 28.897 hectares and the adjoining land PN 11044 Lot 1876 Mukim Plentong (formerly known as Pajakan No 648 Lot 1876 Mukim Plentong) measuring 310 acres, both in the district of Johor Bahru ('the plaintiff's lands' and/or 'Lot 139' or 'Lot 1876' respectively). The plaintiff became the owner of the two aforesaid lots of land on 30 July 1999.
- H**
- I** [2] The first defendant is the main electricity supplier for the country whilst the second defendant is the local authority responsible for the plaintiff's lands in the Johor Bahru.
- [3] The second defendant did not file any statement of defence and did not attend court for trial.

[4] After becoming owner, the plaintiff alleges that the first defendant had committed an act of trespass on Lot 139 and Lot 1876. A

[5] For Lot 139, the plaintiff claims that the first defendant had unlawfully maintained the substation and the overhead transmission lines running across Lot 139 which was constructed pursuant to the lease agreement dated 10 January 1977 and was continuing to trespass on Lot 139 after the expiry of the said lease on 31 March 2005. B

[6] As for Lot 1876, the plaintiff claims that the first defendant had unlawfully entered into Lot 1876 between the years 1974 and 1975 and now it claims damages for continuing trespass on account of the first defendant's overhead transmission lines running across Lot 1876. C

[7] The first defendant denies the plaintiff's claim based on the following grounds: D

(a) around 1976, the Malaysian Ministry of Defence ('MINDEF') requested the first defendant to provide electricity supply to the Royal Malaysian Military ('RMM') camp's residential quarters in Kota Tinggi, Johor Bahru ('the quarters'); E

(b) pursuant to the request, the first defendant had entered into a lease agreement with the Federal Land Commissioner to use the said land to place a substation on Lot 139; F

(c) according to the lease agreement the substation was built by the owner (lessor) which is the Federal Land Commissioner while first defendant installed all the supporting equipments to transmit the electricity; G

(d) around the year 1990, that is before the lease term ended, MINDEF had abandoned the quarters and the occupants of the quarters had been moved elsewhere; G

(e) accordingly, the first defendant had cut off the supply of electricity to the said quarters and dismantled the supporting equipment which was fixed in the substation however the *existing transmission lines that were running across Lot 139 and Lot 1876 were not removed and were maintained since they were used to supply electricity to other users which included village houses located within Lot 1876*; and H

(f) *therefore, for Lot 1876 the first defendant claims that they did not construct any new transmission line on Lot 1876 as there was an already existing transmission line which had been built before 1975. In any event, the transmission lines on Lot 1876 were erected with the knowledge and consent of the Federal Land Commissioner.* I

A [8] In connection with Lot 139 the first defendant states that, the substation was built by MINDEF pursuant to the lease agreement dated 10 January 1977 for the period of 30 years from 1 April 1975 to 31 March 2004. The first defendant has no duty either under the lease agreement or at law to remove the substation and/or to cancel the endorsement of the lease upon expiry or early determination of the lease but the same duty lies with MINDEF who was the lawful occupier by the license of the *Pesuruhjaya Tanah Persekutuan* (Federal Land Commissioner) which meant that the subject land was the property of the Federal Government at the material time.

C [9] The first defendant states that they had a valid approval from MINDEF and Federal Land Commissioner for the construction of the transmission lines at both Lot 139 and Lot 1876. Whereby the first defendant's entry to Lot 139 and Lot 1876 *were made under the Electricity Act 1949* being the governing statute prior to 1 September 1990.

D CORES ISSUES TO BE TRIED

[10] The parties have agreed that the core issues for trial be divided into three parts as follows:

E (a) Lot 139-Substation

Agreed facts

F (1) There is a lease agreement at p 9 Bundle B and pp 15–18 Bundle B.

(2) The lease was endorsed on the title (see pp 7–8 Bundle A and was valid until 31 March 2005).

Triable Issues

G (1) Based on the construction of the lease agreement which has been endorsed on the title for Lot 139 on 28 March 1977 as presentation number 2622/77 *Pajakan Jld 5, Folio 37, whose obligation is it to remove the substation upon the expiry of the 30 year lease on 31 March 22005?*

H (2) Did the first defendant become trespasser on the land after the expiry of the said lease on 31 March 2005?

(3) If the answer to issue (2) above is yes, whether trespass is a continuing trespass?

I (4) Whether the plaintiff, having obtained ownership of the land prior to the expiry of the said lease, is now estopped from claiming for trespass?

(b) Lot 139-Transmission Lines

Triable Issues

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(1) Whether this issue was pleaded by the plaintiff or whether this issue was absent from the pleadings?

(2) If the answer for issue (1) is that the issue was pleaded, whether there was consent by the State/Federal authorities to the transmission lines on Lot 139?

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(3) Even if there was consent, whether the said consent was limited to a maximum period of 30 years commencing from 1 April 1975 to 31 March 2005?

C

(4) Even if there was consent, whether the transmission lines area exceeded the area consented to?

(5) Whether there was a requirement to endorse on the title.

(6) Whether the National Land Code ('the NLC') applies?

D

(7) What is the area of the transmission line under Lot 139.

(c) Lot 1876-Transmission Lines

Agreed Facts

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(1) There are transmission lines on Lot 1876.

(2) There is no endorsement on title for Lot 1876 pertaining to the transmission lines.

Triable Issues

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(1) When the first defendant entered upon Lot 1876 to erect the transmission lines, was it with the consent of the State/Federal authorities in accordance with the provisions of the Electricity Act 1949 and its successor Electricity Supply Act 1990?

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(2) If the answer to issue (1) is in the affirmative, is such consent given by the State/Federal authorities required to be endorsed on the title for Lot 1876 under the National Land Code?

(3) If the answer to issue (1) is in the affirmative, is such consent given by the State/Federal authorities valid and limited for a maximum period of 30 years only under the National Land Code?

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(4) If the answer to issue (1) is in the affirmative, whether the area taken by the transmission lines exceeded the consent given by the State/Federal authorities?

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(5) What is the total area taken by the transmission lines?

(6) Whether it amounts to trespass and if so, whether that trespass is continuing?

A ISSUES FOR DETERMINATION*Issue No 1*

- B** [11] Based on the construction of the lease agreement which has been endorsed on the title for Lot 139 on 28 March 1977 as Presentation No 2622/77 *Pajakan Jld 5* whose obligation is it to remove the substation upon the expiry of the 30 year lease on 31 March 2005.

C *The plaintiff's submission*

- D** [12] The plaintiff submits that from the evidence, that is, pp 3, 6 and 9–10 in Bundle B, MINDEF gave the first defendant permission to enter the land and build the substation. The letter at p 6 Bundle B clearly says that 'Lembaga berkenaan merancang hendak *membina* sebuah pencawang letrik di atas Lot 139'. *No evidence has been led by the first defendant to show that the substation was built by MINDEF themselves.* Although the surveyor (PW2) *did admit that the substation was empty*, the building remains standing on Lot 139 and the lease agreement between the first defendant and MINDEF does not bind the plaintiff. What the first defendant should have done was to remove the structure to enforce their rights under the lease agreement against MINDEF.

- F** [13] Under cl 4(a) of the lease agreement (at pp 15–18 Bundle B), it would be lawful for the lessee (TNB) after the expiration or determination of the tenancy created, to remove and take over from the demised premises all *buildings*, erections, fixtures and other works at attached placed or set upon the demised premises. The plaintiff submits that the word 'buildings' clearly shows that it was the first defendant's duty to remove the substation.

- G** [14] The first defendant contends that they had removed all apparatus from the substation. However, during cross-examination when asked when this was done, DW2 said he did not know when and it was more likely that the documents were with TNB Johor Bahru.

- H** [15] The plaintiff submits that the first defendant has failed to remove the substation and as such, it became a trespasser on the land after the expiry of the said lease on 31 March 2005 and more so, since the first defendant's logo remains on the substation.

I *The defendant's submission*

[16] The first defendant submits that it was provided in the said 30 year lease agreement that in the event that the supply was no longer required, it would be the obligation of the lessor (not LLN) to remove the substation. A

[17] Subsequently when supply was no longer needed via the said substation, LLN vacated the structure. B

[18] There is evidence given by Hj Misron bin Hj Yassin ('PWS2') in cross-examination that the structure when he inspected it and reported via his survey report was without equipment, derelict and therefore not in operation. C

[19] Upon the expiry of the lease agreement on 31 March 2005, no attempt was also made by the plaintiff to require the lessor that is, the Ministry of Defence to remove the said substation and it continued to remain in site until the filing of this suit on the 7 November 2013. D

[20] Under the lease agreement the duty to construct the substation lies on the owner (lessor) (please see pp 12–18 of Bundle B) particularly cl 3 of the lease agreement which states that: *'The lessor hereby covenants with the lessee: (d) To diligently proceed with the construction of the said-substation building if he has not already done so and shall complete the same in accordance with the plans and specifications of the lessee to the reasonable satisfaction of the lessee and shall procure the issue of a certificate of fitness for occupation of the said substation building by the competent issuing authority for such certificate.'* E F

[21] Further the application form dated 11 October 1974 (please see p 1 of Bundle C) clearly stated that:

(b) memajak satu tapak pencawang serta dengan bangunan pencawang yang akan didirikan oleh pengguna mengikut peraturan-peraturan Lembaga selama 30 tahun dengan pilihan untuk membaharuinya selama 30 tahun dengan bayaran sekali saja sebanyak \$10. G

[22] 'Pengguna' in the above referred to the owner namely Federal Land Commissioner. H

[23] Under cl 4 of the lease agreement it was stated that:

That it shall be lawful for the lessee and its agents within (6) six months from the date of expiration or sooner determination of the tenancy hereby created to remove and take away from the demised premises all buildings erections fixtures and other works attached placed or set upon the demised premises *by the lessee* at any time during the said term the lessee nevertheless repairing any damage which may be occasioned to the demised. I

A [24] Pursuant to cl 4 of the lease agreement, the NEB has only to remove and take away all fixtures and other works attached by lessee (NEB) to the substation. The first defendant submits that the word 'buildings' means the subsidiary constructions and does not refer to the substation building.

B [25] DW2 gave evidence in examination-in-chief that it was the owner's duty to erect the substation.

C [26] The plaintiff's solicitor during cross-examination did not challenge the said evidence given by DW2.

D [27] The DW2 further gave evidence that the Federal Land Commissioner abandoned the quarters to whom the NEB was providing the electricity and consequence thereof NEB had removed all of the equipments installed inside the substation.

[28] The first defendant submits that they have no duty to remove/destroy the substation as it was not constructed by them.

E *Ruling of the Court*

F [29] Having perused the evidence adduced, I find that first defendant had no duty to remove the substation building after the expiry of the lease on 31 March 2005 for the following reasons:

G (a) cl 3(d) of the lease agreement clearly shows that the lessor was responsible for the construction of the substation building in accordance with the plans and specifications of the lessee to the reasonable satisfaction of the lessee;

(b) DW2 told the court that according to cl 3(d) of the lease agreement it was the duty of the owner to erect the substation and this piece of evidence was not challenged by the plaintiff;

H (c) the contention of first defendant finds support in the application form dated 11 October 1974 which clearly stated that: 'bangunan pencawang yang akan didirikan oleh pengguna' and the word 'pengguna' refers to the owner, that is, Federal Land Commissioner;

I (d) although there is no clear evidence as to who actually built the substation reasonable inference can be drawn that it was the first defendant who built the substation; and

(e) in interpreting cl 4(d) of the lease agreement, I am of the considered view that first defendant had done what they were obligated to do under cl 4(d) by removing all the fixtures from the substation. I agree with the

submission of the first defendant that the words 'all buildings' in cl 4(d) should mean any subsidiary constructions built by the first defendant and should not refer to the substation building built by the lessor. It would not be reasonable to impose on first defendant to remove the substation building after the expiry of the 30 year lease agreement as the said substation was not built by them.

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[30] For the above reasons, I find that first defendant is not a trespasser by the presence of the substation building even with TNB Logo on its external wall after the expiry of the 30 year lease agreement.

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Even if I was wrong in holding that the first defendant was not a trespasser after the expiry of the 30 year lease for the above reasons, I am of the considered view that since the plaintiff had obtained the ownership over Lot 139 during the tenure of the TNB's 30 year lease which was registered on the title of Lot 139, the plaintiff is deemed to have knowledge of the existence of the substation building (see *Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584).

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Since there is no evidence before this court to show that any party has objected to the existence of the substation after the expiry of the 30 year lease agreement and no legal action taken against the first defendant until the filing of this suit in 2013, the plaintiff is now estopped from claiming for trespass for the presence of the substation: see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

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Issue No 2

Whether the first defendant had obtained approval from the State/Federal Authority to enter and erect the transmission lines over Lot 139 and Lot 1876

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The first defendant's submission

Lot 139

[31] The first defendant submits that they entered Lot 139 with the consent/knowledge of the Ministry of Defence ('MINDEF') which was the lawful occupier of Lot 139 by licence of the Federal Land Commissioner ('the owner') at that time for the purpose of erecting a substation for the supply electricity to the Rumah-Rumah Kerajaan at Jalan Kota Tinggi. This is evident from the various letters between the first defendant and various parties including MINDEF, Land Offices, Federal Land Commissioner tendered during the course of trial as follows:

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- (a) by letter dated 12 July 1974 (please see p 1 of Bundle B) from Perbadanan Kemajuan Ekonomi Negeri Johor ('PKENJ') to LLN, a

- A plan was enclosed for the proposed LLN Substation ('LLN Pencawang') and informing that the invitation to tender for the construction of the LLN Pencawang had been made. This letter was captioned as 'Binaan Rumah-Rumah Kediaman Bagi Angkatan Laut Di Raja Malaysia di Johor Bahru';
- B (b) subsequently by letter dated 26 September 1974 (please see p 2 of Bundle B) from *Perbadanan Kemajuan Ekonomi Negeri Johor* to LLN with regard to Lot 139 and PKENJ informed LLN that the landowner for Lot 139 was the *Kerajaan Persekutuan* and named as 'Federation of Malaya As Trustee' and addressed at the Federal Land Commissioner's Office;
- C (c) by letter dated 31 October 1974 (please see p 2 of Bundle C) from LLN to the *Ketua Pengarah Tanah dan Galian Persekutuan*, LLN informed that land measuring 4,224 square feet was required to build a substation ('pencawang') for the purpose of supplying electricity to the rumah-rumah angkatan tentera at Jalan Kota Tinggi in Johor. The letter was captioned 'Bekalan Letrik Kepada Rumah-Rumah Kediaman Angkatan Di Raja Malaysia Di Jalan Kota Tinggi, Johor Bahru';
- D (d) by letters dated 30 November 1974 and 22 January 1975 (please see pp 4–5 of Bundle B) reminders were sent from LLN to the *Ketua Pengarah Tanah dan Galian Persekutuan* and in the letter, the *Pengarah* was reminded of the pressing need for electricity supply for the purposes stated;
- E (e) by letter dated 6 February 1975 (please see p 6 of Bundle B) from *Pejabat Ketua Pengarah Tanah Dan Galian Persekutuan Kuala Lumpur* to *Ketua Setiausaha, Kementerian Pertahanan*, Kuala Lumpur, the *Ketua Pengarah* had advised the Ministry of Defence to approve LLN's request for approval to enter Lot 139 in order to supply electricity and that a lease would be finalised upon Cabinet's approval for the project. The letter was captioned 'Bekalan Letrik Kepada Rumah-Rumah Kediaman Angkatan Di Raja Malaysia di Jalan Kota Tinggi, Johor Bahru';
- F (f) LLN had by their letters of 17 February 1975 and 21 March 1975 to the Ministry of Defence (please see pp 7–8 of Bundle B), sought a reply from the Ministry of Defence on whether approval was given to LLN to enter Lot 139 to carry out works. The letter was captioned 'Bekalan Letrik Kepada Rumah-Rumah Kediaman Angkatan Di Raja Malaysia Di Jalan Kota Tinggi, Johor Bahru';
- G (g) by letter dated 27 March 1975 from the Ministry of Defence to LLN (please see p 9 of Bundle B), the Ministry of Defence had referred to LLN's letter of 17 February 1975 and informed that the approval was hereby granted for LLN to enter and to commence the necessary works.
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- The letter was captioned 'Bekalan Letrik Kepada Rumah-Rumah Kediaman Angkatan Di Raja Malaysia di Jalan Kota Tinggi, Johor Bahru'; A
- (h) by letter dated 21 May 1979 from LLN to the *Pemungut Hasil Tanah* Johor Bahru (please see p 9 of Bundle B1), LLN has requested the Land Office Johor Bahru to fix a hearing date to hear the objections if any from the land owners with regard to the electricity transmission project above-captioned which involved both Lots 1876 and 139. The letter is captioned 'Aliran Elektrik 132 kV dari Tiang No 25 Skudai/Kluang, Cabang ke Kilang Simen Gunong Semelayang, Johor (Daerah Johor Bahru)'; B C
- (i) by letter dated 28 November 1979 from *Pejabat Ketua Pengarah Tanah dan Galian Persekutuan* (please see p 11 of Bundle B), LLN had requested for the original title for Lot 139 for the purposes of registering the lease and endorsing the same on the said original title whereupon it would be returned to the *Pengarah*. The letter was captioned 'Pajakan Tapak Pencawang Letrik di Rumah-Rumah Angkatan Laut Di Raja Malaysia, Jalan Kota Tinggi, Johor Bahru (Lot 139)'; D
- (j) by letter dated 11 January 1977 from *Pejabat Ketua Pengarah Tanah dan Galian Persekutuan*, Kuala Lumpur to LLN dated 11 January 1977 (please see p 19 of Bundle B), the *Pejabat Ketua Pengarah* had forwarded the original title for Lot 139 and signed lease agreements for the purposes of submission to the Land Office via LLN. The subject caption of this letter is 'Pajakan Tapak Pencawang Letrik di Rumah-Rumah Angkatan Laut di Raja Malaysia, Jalan Kota Tinggi, Johor Bahru (Lot 139)'. E F
- [32] During the course of trial, the first defendant had tendered various documents to show that valid approval had been obtained before constructing the transmission lines on Lot 139 namely: G
- (a) a 'notice' that is, *Undang-Undang Letrik 1949, Notis Pemberitahu Hendak Masuk Dan Membuat Kerja Dalam Kawasan Tanah Di Bawah Seksyen 53* dated 29 November 1976 (p 12 of Bundle B1) was issued by LLN concerning Lot 139 and was issued to the Federal Land Commissioner informing of LLN's intention to (a) enter upon the said land to clear a rentice of two chains by removing vegetation and trees, (b) to erect pylons ('tiang-tiang') and to install electricity transmission wires ('merentang dawai bekalan letrik') within the said 'rentice' and to clear a pathway of five feet in width underneath such wires for the purposes of maintenance and c) to use existing roads and lanes to carry out the said construction works. The landowner that is, Federal Land Commissioner was given 14 days within which they could raise an objection; H I

- A (b) by letter dated 10 February 1976 from *Pejabat Tanah Johor Bahru* to the Chief Secretary of the Ministry of Defence (p 6 of Bundle 'B1'), the *Pemungut Hasil Tanah* had informed the Ministry of Defence, amongst other things, that the electricity transmission project captioned was with regard to both Lot 139 where the 'Rumah Tentera' was located as well as
- B Lot 1876 where the army camp was located. The letter is captioned 'Aliran Letrik 132 kV dari Tiang No 25 Skudai/Kluang, Cabang ke Kilang Simen Gunong Semelayang, Johor (Daerah Johor Bahru)';
- C (c) by letter dated 24 November 1977 from the Chief Secretary of the Ministry of Defence to LLN and signed by one Kamarol Zaman bin Ujang (at p 57 of Bundle B and also at pp 4–5 of Bundle C1 and marked as exh D1-A for letter and plan as Bundle D1-B), the Ministry of Defence referred to the previous letter dated 30 August 1977 from LLN to them and informed that the Ministry of Defence had approved the request for consent to enter. A plan was attached signed by the said
- D Kamarol Zaman bin Ujang which can be seen at p 5 of Bundle 'CV which shows the transmission through both *Lots 1876 and Lot 139* which are shown in the legend as 'TANAH MILIKI TENTERA'. The letter was captioned 'Aliran Letrik 132 kV dari Tiang No 25 Skudai/Kluang, Cabang ke Kilang Simen Gunong Semelayang, Johor (Daerah Johor Bahru)';
- E (d) by letter dated 21 May 1979 from LLN to the *Pemungut Hasil Tanah, Pejabat Tanah Johor Bahru* (p 9 of Bundle B1), *LLN requested the Land Office to arrange for a hearing to hear the objections of the landowners with regard to the captioned electricity transmission line project and the lands affected were stated amongst other to include Lot 139 and Lot 1876* owned by involving two 'Rentice' each. The letter is captioned 'Aliran Letrik 132 kV dari Tiang No 25 Skudai/Kluang, Cabang ke Kluang Simen Gunong Semelayang, Johor (Daerah Johor Bahru).
- F
- G

[33] The first defendant submits that similar to the transmission lines for Lot 139, consent for Lot 1876 was applied for under s 53 of Electricity Act 1949 and was granted. This enabled the first defendant to erect transmission lines over Lot 1876. The consent was given during the period of the subject land being held by MINDEF

H

[34] During the course of trial the first defendant had tendered the following documents pertaining to the approval of the entry of first defendant into Lot 1876 namely:

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- (a) a notice that is, *Undang-Undang Letrik 1949, Notis Pemberitahu Hendak Masuk Dan Membuat Kerja dalam Kawasan Tanah Di Bawah Seksyen 53* dated 31 October 1972 was issued by LLN to the landowners for the LLN electricity transmission project 'Aliran eletrik 132 kV talian atas

- Cabang-Tee dari Tiang No 25 Skudai/Kluang ke Pasir gudang (Masai) — (Daerah Johor Bahru)’ (at pp 2–3 of Bundle V). By this notice the affected listed landowners which include Lot 1876 (list is at p 3 of Bundle ‘D’) were informed by LLN of LLN’s intention to (a) enter upon the said land to clear a rentice of two chains by removing vegetation and tress (b) to erect pylons (‘tiang-tiang’) and to install electricity transmission wires (‘merentang dawai bekalan letrik’) within the said ‘rentice’ and to clear a pathway of five feet in width underneath such wires for the purposes of maintenance and (c) to use existing roads and lanes to carry out the said construction works. The landowner that is, Federal Land Commissioner was given 14 days within which they could object;
- (b) by letter dated 22 November 1973 from the *Pejabat Tanah Johor Bahru* LLN (at p 5 of Bundle D), the *Pejabat Tanah* had referred to LLN’s letter of 15 October 1973 and informed LLN that the government had given full approval for LLN’s application for its entry for all lands owned by the government that concerns this electricity transmission project captioned in this letters as ‘Aliran elektrik 132 kV talian atas Cabang-Tee dari Jiang No 25 Skudai/Kluang ke Pasir Gudang (Masai)—(Daerah Johor Bahru)’;
- (c) by letter dated 30 August 1977 from LLN to the Chief Secretary of the Ministry of Defence (at pp 54–55 of Bundle B), LLN had forwarded to the Ministry of Defence a plan depicting the location of the electricity transmission lines over Lot 1876. The plan is seen at p 66 of Bundle B. Both the plan and the letter concerned were captioned ‘Aliran Letrik 132 kV dari Tiang No 25 Skudai/Kluang, Cabang ke Kilang simen Gunong Semalayang, Johor (Daerah Johor Bahru) No Lot 1876’; and
- (d) by letter dated 24 November 1977 from the Chief Secretary of the Ministry of Defence to LLN and signed by one Kamarol Zaman bin Ujang (at p 57 of Bundle B and also at pp 4–5 of Bundle C1 and marked as exh D1-A for letter and Plan as Bundle D1-B), the Ministry of Defence referred to the previous letter dated 30 August 1977 from LLN to them and informed that the Ministry of Defence had approved the request for consent to enter. A plan was attached signed by the said Kamarol Zaman bin Ujang which can be seen at p 5 of Bundle C1 which shows the transmission through both Lots 1876 and Lot 139 which are shown in the legend as ‘TANAH MILIKI TENTERA’. The letter was captioned ‘Aliran Letrik 132 kV dari Tiang No 25 Skudai/Kluang, Cabang ke Kilang Simen Gunong Semalayang, Johor (Daerah Johor Bahru)’.

A [35] The first defendant further submits that the defendant was within their statutory rights to build any transmission lines to provide electricity supply over Lot 139 as well as Lot 1876 whether or not there was a lease for the substation.

B [36] On the issue whether the construction of the transmission line at Lot 139 has any connection to the lease agreement, first defendant submits that defendant's entering to Lot 139 for the construction of the transmission line was made pursuant to s 53 of 1949 Act, while the 30 year lease agreement registered on 28 March 1977 was only in relation to the construction of the substation.

C [37] Therefore there is no need for the court to determine whether consent from MINDEF for the construction of the transmission lines at Lot 139 was limited to a maximum of 30 years.

The plaintiff's submission

Lot 139

E [38] The plaintiff submits that all the letters put in the bundles of documents by first defendant may or may not have referred to the transmission lines on Lot 139 and Lot 1876 as DW1 himself was unable to discern which transmission lines were referred to as 'Tiang 25-Skudai-Kluang-cabang ke Kilang Simen Gunong Sumalayang or Tiang 25-Skudai-Kluang-Pasir Gudang or Tiang 25-Skudai-Johor Bahru-Kota Tinggi'.

F [39] The plaintiff submits that according to DW2 when he said the consent was by way of the letters. But he said the letters were not letters to build pylons but letters to build substation.

G [40] When asked about whether TNB had paid compensation and the annual rental for the building of the pylons and transmission lines, DW2's answer was 'minta maaf, saya tidak dapat jawab soalan itu.'

H [41] On the whole the plaintiff submits that the first defendant had failed to adduce sufficient evidence to prove that consent had been obtained for the erection of the transmission lines on Lot 139 and Lot 1876.

I *Ruling of the court on issue No 3*

[42] From the evidence adduced, I find that LLN had sought the consent of MINDEF which was the lawful occupier by the license of the Federal Land Commissioner which was a Federal Government entity in order that they may

be allowed to enter upon (i) Lot 139 to carry out the necessary works for the purposes of electricity supply which would include a substation as well as the transmission line. It does not make sense for the plaintiff to say that the approval for TNB to enter Lot 139 was to build the substation only as the supply of electricity cannot be supplied via the substation without the transmission lines.

A

B

[43] Similarly I also find that there was sufficient evidence to show that consent had been given to the first defendant to enter Lot 1876 to erect transmission lines there. I also find that the consent was given to the first defendant under s 53 of the 1949 Act to build transmission lines to provide electricity supply over Lot 139 and Lot 1876 irrespective of the 30 year lease agreement.

C

Issue No 3

D

Whether the first defendant had complied with the requirements of s 53 of the 1949 Act by issuing a s 53 notice to enter and erect transmission lines over Lot 139 and Lot 1876 plaintiff's submission.

[44] The plaintiff submits that the Electricity Act is subject to the National Land Code on three grounds: (1) Both the electricity Acts 1984 and 1990 recognise the fact of the requirement of endorsement under the National Land Code. (2) The first defendant's right to erect the transmission lines cannot be in perpetuity because the National Lands Code read with the Electricity Act would mean that the right to lay a transmission line over part of the land could be created by tenancy, license or a lease not exceeding 30 years. If the first defendant wanted the whole land, the law says they are to acquire the land. (3) The fact that endorsement of notice must follow the procedure laid down by the land office would mean that impliedly that it is governed by the National Land Code.

E

F

G

[45] *The plaintiff submits that endorsement is required under s 53(9A) of the Electricity Act 1949 and Electricity Act 1990. The purpose of endorsement is to give notice to the world. Here, the plaintiff bought the whole lands by way of a privatisation exercise (see evidence of PW1).*

H

[46] The plaintiff submits that the first defendant's failure to endorse on the title would mean that even if there was an agreement to pass any interest on the land to the first defendant, it not being duly registered under the NLC, it would not be binding on the subsequent owner that is, the plaintiff here. The plaintiff would rely upon the Federal Court decision in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, which, inter alia, held that for example, *a tenancy to be binding had to be registered and protected under the National Land code and will be defeated by a subsequent registered dealing.*

I

A The Federal Court also held that, *assuming that the party reiving was a licensee, the service of the writ (or a notice to quit) would be a notice of termination of the license.*

B [47] The plaintiff also relies on the decision of the High Court in *Syarikat Pengangkutan Kesejahteraan Sdn Bhd & Anor v Tenaga Nasional Bhd; Ng Ah Boon (Third Party)* [2010] 1 CLJ 625 (which has since been affirmed by the Court of Appeal) where the court held that without a proper endorsement of the notice purportedly issued under s 11(2) of the Electricity Act 1990 (which is similar to s 53 of the Electricity Act 1949) and without proof of proper assessment inquiry at the District Land Administrator's office as provided by the law, the preconditions of the Electricity Act not being satisfied, the court could not give legal recognition to the occupation of the plaintiff's land by the defendant as this would not only be contrary to the provisions of the Electricity Act in particular ss 11 and 16 but would also be a violation of art 13(1) of the Federal Constitution which provides that no person shall be deprived of his property save in accordance with the law. The learned judge Hishamuddin Yunus J went on to say that it is his judgment that *it was no answer that the recipient of the alleged notice had never objected to whatever was done by the defendant TNB or the District Administrator and had in fact accepted the compensation.* The learned judge then allowed the plaintiff's claim for damages for trespass with damages to be assessed by the registrar.

F [48] The plaintiff submits that although first defendant has adduced evidence to show that there was a decision by the Land Administrator but they had not shown that the compensation was paid.

The defendant's submission

Whether endorsement is required

G [49] The first defendant submits that Electricity Act is a specific statute whereas the National Land Code is a general statute. Where there is a conflict over certain matter between the two statutes, the rule of construction is that specific statute will prevail over the general statute.

H [50] The first defendant concedes that the 1949 Act was amended by the Electricity (Amendment) Act 1987 to include subsection (9A) to s 53 which requires the endorsement of the notice of such entry on the title deeds of the plaintiff. However, the first defendant submits that such an amendment does not have any retrospective effect on s 53 of the 1949 Act.

I [51] In support of their contention the first defendant had relied upon the case of *Arumugam a/l Letchumanan v Tenaga Nasional Bhd* [2011] 5 MLJ 279 where the court had to address the issue of whether there was compliance of

s 53(9A) of the 1949 Act in that there was no endorsement on the plaintiff's title in respect of the defendant's right of way in the construction of a line on the plaintiff's lot in 1981. The High Court had this to say:

... On the issue of right of way, it is appropriate to state that the plaintiff claims there is no compliance of s 53(9A) of the 1949 Act in that there is no endorsement or notation on the plaintiff's Lot (para 29 of PWS). In this regard I adopt the evidence pertaining to Felda Sungai Klah being divided into 'Blok-Blok' or 'Peringkat' as at para 16 above. Further the evidence shows that the collector of land revenue Batang Padang had conducted an inquiry on 27 January 1981 under the 1949 Act and s 53(9A) was not in existence then as it only came into force on 1 April 1984. In *Oakfield Enterprise Sdn Bhd*, a similar objection was taken. I adopt the position taken by the learned judge in the said case at paras 47–48 of the judgment and also hold the defendant cannot be faulted for omitting to submit those documents for endorsement as there was no such provision at the material time.

[52] The High Court in so holding has adopted the position taken by the Court of Appeal in *Oakfield Enterprise Sdn Bhd v Tenaga Nasional Bhd* [1998] MLJU 70.

[53] Therefore the first defendant submits that, since the first defendant's entry to Lot 139 and to Lot 1876 to construct transmission line was done prior to 1 April 1984 then there is no requirement to endorse the first defendant's entry/rights on the plaintiff's title.

[54] Based on the two aforesaid authorities the first defendant submits that the transmission lines on Lot 139 and Lot 1876 were constructed in 1970s and the governing Act was the pre-amendment 1949 Act which does not require the endorsement of the first defendant's right of entry on the plaintiff's title deeds.

[55] The first defendant further submits that first defendant's right to build transmission lines is governed by the Electricity Act. The first defendant had the rights under s 53 of the Electricity Act 1949 to build the transmission lines to provide electricity supply over Lot 139 and Lot 1876 and there was no such statutory duty to endorse upon the titles for Lot 139 and Lot 1876 such grants of the right of entry prior to 1984.

On the issue whether the pre conditions under s 53 had been complied with

[56] Section 53(1) of the 1949 Act provides that the board/licensee in installing the transmission lines and taking necessary steps to a render such installation safe and efficient is required to pay full compensation in accordance with s 58 to all persons interested for any disturbance, damage or disability that may be caused thereby.

- A [57] The board or licensee before entering on any land for the purpose specified in sub-s (1) shall give notice stating as fully and accurately as possible the *nature and extents of the acts intended to be done*. The notice shall be in the form in the Fourth Schedule.
- B [58] The first defendant submits that they have complied with the requirements of s 53 by issuing the statutory notices in respect of Lot 139 and Lot 1876 which had enabled them to enter upon the said lands to erect all the necessary pylons and transmission lines for the purposes of supply of electricity to the locations at the request of the MINDEF.
- C [59] The first defendant submits that the alleged processes subsequent to the entry under s 53 like the issue of compensation is not relevant to any subsequent transferee of the land such as the plaintiff.
- D [60] In accordance with s 53, the proper parties that would be concerned with regard to such entry is the actual land owner if alienated, the land administrator and the first defendant at that time called NEB. Further in accordance with s 53(4) and (5) if any objection with regard to any disturbance damage or disability caused by the acts of the construction of the transmission lines, is lodged by the land owner or occupier, then an enquiry will be held by the Land Administrator to determine the amount of compensation to be paid in accordance with s 58 of the Act:
- E
- F [61] Section 58 provides that the collector of land revenue shall after such inquiry assess and determine as it deemed sufficient the amount of any compensation. Any person interested who was dissatisfied with the collector's assessment may appeal to the State Authority whose decision shall be final.
- G [62] The first defendant submits that this right does not devolve onto any other subsequent transferee of the subject land. In view of this, this court has no longer any original jurisdiction to award any form of compensation or to predetermine whether or not there has been any form of trespass or encroachment.
- H
- Ruling of the court*
- Whether the endorsement of the notice of entry on the plaintiff's title deed was required*
- I [63] First and foremost, I am of the considered view that the right to enter and to erect upon such land, such post and apparatus as may be necessary for the purposes of installation of any system of distribution of energy is governed by the Electricity Act. As to whether the notice of such right of entry need to be

endorsed on the title to the subject land would depend on the provisions of the Act. There are two positions governing the endorsement of notice of such entry under the Act namely (i) the 1949 Act (pre amendment that is, before 1 January 1984) and the 1949 Act (post amendment).

A

[64] Since s 53(9A) of the Electricity Act 1990 which was added to s 53 by the Electricity (Amendment) Act 1984 affects the right of a party, it shall not have any retrospective effect on s 53 of the Electricity Act 1949 (pre amendment).

B

In our case, the first defendant's entry upon Lot 139 and Lot 1876 to construct the transmission lines were done prior to 1 January 1984 and are therefore governed by the s 53 of the 1949 Act (pre amendment) which does not require the endorsement of first defendant's notice of entry on the plaintiff's title deed (see *Arumugam's* case and *Oakfield's* case).

C

As to whether the preconditions of s 53 have been complied with

D

[65] I am satisfied that first defendant had complied with the requirements under s 53 of the 1949 Act by issuing a s 53 notice to enter and erect the transmission lines over *Lot 139 and Lot 1876* by stating as fully and accurately as possible the nature and extent of the acts intended to be done.

E

[66] I agree with the submission of the first defendant that the alleged processes subsequent to entering pursuant to s 53 as regards the paving of compensation in accordance with s 58 to all persons interested for any disturbance, damage or disability that may be caused thereby, are not relevant to our case for the following reasons:

F

- (a) the payment of compensation is the jurisdiction of the land administrator;
- (b) the only person who has the right to lodge an objection is the land owner, that is the Federal Land Commissioner;
- (c) if the land owner is not satisfied with the Land Administrator's assessment he may appeal to the State Authority whose decision is final; and
- (d) the right does not devolve onto any subsequent transferee or purchaser of the subject land. It is not now open to the subsequent transferee or purchaser of the subject land to claim damages for any form of trespass. The subsequent transferee land is fully aware of the pre existing conditions of the land when he acquired or purchased it. He is therefore deemed to have purchased the said lands with such an encumbrance.

G

H

I

A [67] I also find that in the event if there was obstruction to any development work of the plaintiff caused by the presence of transmission lines over Lot 139 and Lot 1876 there was right of recourse under s 55 (1) of the 1949 Act which the plaintiff had not acted upon.

B [68] All considered I find that the first defendant had complied with the preconditions as required under s 53 of the Act.

Issue No 4

C *Even if there was consent whether the transmission lines have exceeded the area consented?*

The plaintiff's submission

D [69] The plaintiff claims that they have proved the encroachment on their lands vide the survey report tendered through PW2. The plaintiff's survey report tendered through PW2 shows the substation has utilised 0.018 acres and the transmission lines on Lot 139 took an area of 0.895 acres. The plaintiff contends that this in total constitutes 0.913 acres. The survey report also shows
E that there was no approval for the construction of the two separate transmission lines on Lot 1876 and the total area trespass was 10.749 acres.

[70] The plaintiff further contends that the first defendant only challenged the surveyor's report being inconclusive on the ground that he did not make the
F necessary enquiries at the Land Office and with the Ministry. The first defendant should have brought in their surveyor to prove otherwise but they had failed to do so.

G [71] The plaintiff also submits that even if the first defendant had been given consent for an acreage the only document that shows the acreage for that main transmission lines on Lot 1876 was six acres three rods and 27 poles which is 6.919 acres. However the area where the consent was given according to their surveyor was 7.097 acres. Therefore there is still a trespass of (7.097–6.919
H acres) which was admitted by DW1 himself.

The defendant's submission

I [72] The first defendant submits that the survey report of PW2 on the encroachment or trespass on Lot 139 and Lot 1876 was inconclusive as PW2 himself had admitted during cross-examination that he had, in drawing his conclusion relied only on documents provided to him by the plaintiff and not from any independent enquiry which he ought to have made but did not at MINDEF and the land office concerned.

[73] The first defendant therefore submits that PW2's views on the encroachment in Lot 139 and Lot 1876 are accordingly unproved and lack proper analysis with the relevant authorities and full supporting documents. A

[74] Therefore the survey report of PW2 is of no legal basis and cannot establish a claim for trespass. B

[75] The first defendant further submits that the two statutory notices issued under s 53 of the Electricity Act 1949 with regard to Lot 139 as well as Lot 1876 did indeed give the first defendant the statutory right of entering the subject land to erect all the necessary pylons and transmission lines. The said notices clearly show the average land area which would be required to facilitate the construction and maintenance of the lines. C

[76] The actual land area involved in terms of acreage need not be determined at that stage but will be determined by the Land Administrator during the enquiry proceedings after an objection is lodged by the land owner or occupier. The Land Administrator will then determine the amount of compensation to be paid if any. It is not open to any subsequent transferee or purchaser of land to allege any form of trespass. The first defendant relied on the case of *Tenaga Nasional Berhad v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707 to support its contention. D E

[77] In the case of the *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707 it is clearly stated that upon invocation of s 11(1) notice under the Electricity Supply Act 1990 which is substantially in 'pari materia' with s 53 of the 1949 Act, *the actual land area involved in terms of acreage need not been determined at that stage but will be considered during the enquiry proceedings conducted by the Land Administrator*. In delivering this judgment unanimously for the Court of Appeal His Lordship Gopal Sri Ram JCA had said that s 11(1) of the 1990 Act included pylons designed to carry electrical power from one point to another and not merely 'posts' and any enquiry would also determine apart from disturbance damage and disability, any deprivation or loss of use of the land in consequence of the erection of the pylons. His Lordship went on to say that the *alleged in applicability of the act that is the 1990 Act* to that case where the land has to be set aside for the construction of the pylons was more appropriate for the hearing before the bind administrator under s 11(6) of the 1990 Act. His Lordship further said the 1990 Act does indeed enable the setting aside of land. He said that pylons needed to rest on solid ground and it followed that some land had to be set aside for the purpose. F G H I
He went on to say that the statutory approach used for the Electricity Act is purposive as is the correct of approach in modern statutory interpretation. It was also stated in this case that a 'rentice' of two chains meant two chains on either side of the pylon. The first defendant therefore submits that this is also the position under

A the 1949 Act which requires adherence to its statutory procedures for the determination of compensation based on the extent of the land used in such matters of electricity transmission lines constructions wherefore the survey report of PW2 is of no legal basis and cannot establish a claim for trespass and accordingly the claim of the plaintiff must fail.

B

[78] However, any subsequent owner of land may make an application to the LLN to remove or alter the alignment of electricity pylons and transmission wires under s 55 of the Electricity Act 1949. However, the plaintiff being the subsequent owner failed to seek relief as provided for under the Act.

C

Ruling of the court

D [79] It is to be noted that the plaintiff's claim for trespass is premised on the survey report of PW2. First and foremost I agree with first defendant's submission that the survey report is inconclusive and cannot be relied upon simply because his report is incomplete as he had in drawing his conclusion in the report relied only on documents provided to him by the plaintiff only and not from any independent enquiry which he ought to have make but did not at the MINDEF and the land office.

E

[80] As to whose burden to prove the actual area of encroachment on Lot 139 and Lot 1876, I am of the view that since the plaintiff was claiming damages for trespass, the burden is on them to prove the actual area of encroachment for the purpose of assessing damages. It is not necessary for the first defendant to bring their surveyor to prove otherwise. In the circumstances I find that the plaintiff has failed to prove on the balance of probabilities the actual area of encroachment of the transmission lines.

F

G

[81] On the issue whether to what extent the transmission lines on Lot 139 and Lot 1876 had exceeded the area consented to for the erection of the said transmission lines, I am of the view that in a normal claim for trespass of land where the defence is one of consent the burden is on the defendant to show the area consented to for the construction of any building or structure on the plaintiff's lands.

H

[82] In our case, the plaintiff's claim for trespass has arisen from the exercise of a statutory right of entry to construct the transmission lines with the consent of the MINDEF under ss 52 and 53 of the Electricity Act 1949.

I

[83] The procedure of payment for compensation due to the statutory right of entry is governed by ss 53, 58 and 59 of the Act.

[84] In our case, I agree with first defendant that since it has been established that consents were applied for the erection of the transmission lines over Lot 139 and Lot 1876 and were granted under s 53 of the Electricity Act 1949, the actual land area consented for the erection of the transmission lines need not be determined at that stage but will be considered during the enquiry proceeding conducted by the Land Administrator: see *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707. A B

[85] I therefore find that whether the transmission lines have exceeded the area consented should be determined by the Land Administrator during the enquiry. C

[86] However, I find that the plaintiff cannot claim damages for trespass arising from the exercise of the statutory right of entry to construct the transmission lines under s 53 of the Electricity Act for the following reasons: D

(a) any claim of damages for trespass arising from the exercise of the statutory right to construct transmission lines should be determined during the enquiry conducted by the Land Administrator upon objection raised by the land owner/occupier in accordance with ss 53, 58 and 59 of the 1949 Act. In our case it has been established by the first defendant that by a letter dated 21 May 1979, LLN had requested the Land Office to arrange for an enquiry to hear the objections of the land owners with regard to the captioned electricity transmission lines project and the lands affected amongst others to include Lot 139 and Lot 1876, (see p 9 of Bundle B1—Part B Documents). E F

It has also been established vide letter dated 20 July 1977 from the collector of land revenue that an enquiry in respect of Lot 1876 had been held in the Johor Bahru Land Office on 15 May 1977 (see letter at p 7 of Bundle B1—Part B Documents). G

The above letters clearly show that the issue of payment of damages had been dealt with by the Land Administrator;

(b) this right to raise objection under the Act does not devolve onto any subsequent purchaser of the said lands; and H

(c) the plaintiff is deemed to have notice of the existence of the TNB's substation and the transmission lines erected on the Lot 139 and Lot 1876 when they purchased the said lands. They had therefore purchased the said lands with such an encumbrance. The only relief the plaintiff could seek under the 1949 Act was not damages but to apply to the first defendant to remove or alter the alignment of electricity pylons and transmission wires under s 55 of the Act which they failed to do. To allow the plaintiff, being a subsequent transferee/purchaser to now claim for I

- A damages for trespass would defeat the purpose of s 53 of the Electricity Act 1949.

Issue No 5

- B *Whether the plaintiff's action is time barred?*

The first defendant's submission

- C [87] The first defendant submits that from the chronology of events, it is clear that the plaintiff obtained the ownership of Lot 139 on 30 July 1999 and if the plaintiff was disputing the defendant's entry then the cause of action under the law accrued on 30 July 1999.

- D [88] Section 6(1)(a) of the Limitation Act 1953 states that 'an action is tort or contract shall not be brought after the expiration of six years from the date which the cause of action accrued'. The first defendant therefore submits that the plaintiff's action is time barred.

- E [89] The first defendant relied on s 6(1)(a) of the Limitation Act 1953 and the following cases to support their contention:

- (a) *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784;
(b) *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409;
F (c) *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207; and
(d) *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603.

The plaintiff's submission

- G [90] The plaintiff submits that the authorities on time bar cited by first defendant are not applicable since this is a case of continuing trespass where successive actions will lie from day to day until the objects of the trespass are removed.

- H [91] The plaintiff relied on the case of *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24 where His Lordship Abdul Malik Ishak J (as he then was) held:

- I A trespass of this nature will only abate once the defendant removes the ground anchors. It is a continuing trespass and successive actions will lie from day to day until the ground anchors are removed and in each action damages (unless awarded in lieu of an injunction) are assessed up to the date of the action.

[92] The plaintiff also relied on two other cases to support their contention, namely:

- (a) *MTB Rubber Sdn Bhd v Wangi KMB Bhd* [2007] 8 MLJ 241; and
- (b) *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd* [1986] 1 MLJ 412.

Ruling of the court

[93] I agree with the plaintiff's submission that their claim for trespass is not time barred if the court agrees with their contention that the existing substation and the transmission lines constitute a continuing trespass until they are removed.

DECISION

[94] Having considered the evidence adduced by both parties and having heard their respective submissions, I find that the plaintiff has failed to prove their claim for trespass against the defendants on the balance of probabilities.

[95] For the above reasons, I dismissed the plaintiff's claim with cost of RM25,000 to be paid by the plaintiff to the first defendant.

Claim dismissed with costs of RM25,000.

Reported by Afiq Mohamad Noor